

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS  
BOARD DIVISION OF JUDGES  
NEW YORK OFFICE**

**DEEP DISTRIBUTORS OF GREATER NY D/B/A THE  
IMPERIAL SALES, INC.**

**and**

**29-CA-147909**

**UNITED WORKERS OF AMERICA, LOCAL 660**

**DEEP DISTRIBUTORS OF GREATER NY D/B/A THE  
IMPERIAL SALES, INC.**

**and**

**29-CA-157108**

**HENRY HERNANDEZ, AN INDIVIDUAL**

**and**

**DEEP DISTRIBUTORS OF GREATER NY D/B/A THE  
IMPERIAL SALES, INC.**

**and**

**29-RC-146077**

**UNITED WORKERS OF AMERICA, LOCAL 660**

**ORDER MODIFYING ORDER IN PREVIOUS DECISION**

My Decision dated May 6, 2016 inadvertently omitted a ruling on the General Counsels' request for enhanced remedies which was received in evidence as G.C. Exhibit 3. On May 16, 2016, the General Counsels filed a Motion to Modify Order, requesting that I modify the Order in that Decision by granting their request for enhanced remedies.

After due consideration, I have granted the Motion in some respects and denied the Motion in other respects. I have amended the Remedy, Order and Notice portions of the Decision dated May 6, 2016, which should be substituted for the original Remedy, Order and Notice in the Decision dated May 6, 2016, as follows:

**The Remedy**

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent has unlawfully implemented new work rules on July 21, 2015 regarding cell phone use and lateness, I shall order that it rescind those new work rules.

The Respondent having discriminatorily discharged and refused to reinstate Wilfredo Argueta, Jose Martin Torres, Jose Michael Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon, it must offer them reinstatement to their

former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed, absent the discrimination against them. Further, I shall recommend that the Respondent make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub. nom. *Jackson Hospital Corp. v NLRB*, 647 F.3d 1137 (D.C. Cir. 2011). In accord with *Tortillas Dan Chavas*, 361 NLRB No.10 (2014), my recommended Order also requires the Respondent to (1) submit the appropriate documentation to the Social Security Administration so that when backpay is paid to the employees, it will be allocated to the appropriate calendar quarters, and/or (2) reimburse them for any additional Federal and State income taxes they may be assessed as a consequence of receiving a lump-sum backpay award covering more than 1 calendar year.

The General Counsel requests an Order that Wilfredo Argueta, Jose Martin Torres, Jose Michael Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon be reimbursed for their search for work and work-related expenses, without regard to whether interim earnings are in excess of these expenses. Normally, such expenses are considered an offset to interim earnings. However, the General Counsel seeks a change in existing rules regarding such expenses.

This would require a change in Board law, which is solely within the province of the Board and not an administrative law judge. Therefore, I shall not include this remedial proposal in my recommended order. The Board has recently stated that it will not order such relief at this time. *Goodman Logistics, LLC*, 363 NLRB No. 177, fn. 2 (2016).

In accordance with the Board's decision in *J. Piccini Flooring*, 356 NLRB No. 9, slip op. at 5-6 (2010), I shall recommend that the Respondent be required to distribute the attached notice to members and employees electronically, if it is customary for the Respondent to communicate with employees and members in that manner. Also in accordance with that decision, the question as to whether a particular type of electronic notice is appropriate should be resolved at the compliance stage. *J. Piccini Flooring*, above, slip op. at 3. See *Teamsters Local 25*, 358 NLRB No. 15 (2012).

The General Counsel has requested certain enhanced remedies. In *Federated Logistics & Operations*, 340 NLRB 255, 256 (2003), the Board, citing *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995), stated that it "may order enhanced or extraordinary remedies when the Respondent's unfair labor practices are 'so numerous, pervasive, and outrageous' that such remedies are necessary to 'dissipate fully the coercive effects of the unfair labor practices found.'" Especially since a small bargaining unit is involved, "the probable impact of [the] unfair labor practice is increased." *Excel Case Ready*, 334 NLRB 4, 5 (2001).

In addition, the Board has found that a broad order requiring a respondent from engaging in misconduct "in any other manner," instead of a narrow order to refrain from misconduct "in any like or related manner" is necessary when a respondent has engaged in

“such egregious or widespread misconduct as to demonstrate a general disregard for the employees’ fundamental statutory rights.” *Hickmott Foods*, 242 NLRB 1357 (1979).

In addition, in such cases, the Board has ordered a respondent to furnish periodic, updated lists of employee names and addresses to the union, so that the union can help to counteract the effects of these violations in its communications with employees, and to enable the union to “present its message in an atmosphere relatively free of restraint and coercion.” *Federated Logistics*, above, at 258; *Excel Case Ready*, above, at 5.

Further, the Board has required the public reading, by an official of the respondent, of a notice to its employees, so that “they will fully perceive that the Respondent and its managers are bound by the requirements of the Act.” *Homer D. Bronson Co.*, 349 NLRB 512, 515 (2007).

The publication of the Notice to Employees has been found an appropriate remedy in cases such as this one. *Pacific Beach Hotel*, 361 NLRB No. 65 (2014).

I find that all of the above enhanced remedies are necessary to dissipate the serious unfair labor practices which the Respondent engaged in. As set forth above, shortly after the Union began organizing the employees, the Respondent immediately embarked on a campaign to identify the Union’s supporters. The Respondent learned that Jose Michel Torres and Alex Argueta were union adherents and discharged them, along with Jose Michel Torres’ brother, Jose Martin Torres. Later, after five other employees filed a FLSA lawsuit, the Respondent discharged them for not signing its unlawfully implemented rules concerning lateness and cell phone use.

The Respondent’s admitted violations of the Act by threatening employees with unspecified reprisals, telling employees that it would be futile to select the Union, and threatening them with discharge if they voted for the Union, all constitute serious violations of the Act.

Finally, and most egregiously, the Respondent attorney’s threat to employees in the hearing room that he would report them to immigration authorities and that if they testified they would be committing fraud constituted extraordinary intimidation of the employee witnesses. Not only did it instill fear in them that they may be reported to governmental authorities, but it conveyed the message that if they gave testimony they would be in legal jeopardy.

Accordingly, I find that the General Counsel has established good cause for the imposition of the above enhanced remedies, and I shall order that the Respondent be required to undertake them.

However, I will not order two additional special remedies requested by the General Counsel. The General Counsel requests an Order that the Respondent be required to “schedule training for all employees on their rights under the Act conducted by a Board agent during paid work time; and an Order requiring the Respondent to schedule training for all supervisors and managers on compliance with the Act conducted by a Board agent during paid work time. No Board precedent has been cited for the imposition of such Orders, and no detail has been given concerning the nature or length of the training

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>1</sup>

### ORDER

The Respondent, Deep Distributors d/b/a The Imperial Sales, Inc., Bethpage, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Discharging employees because they engaged in union activities, concerted activities, and because they filed a lawsuit pursuant to the Fair Labor Standards Act.

(b) Giving its employees the impression that their Union activities were under surveillance.

(c) Threatening its employees with unspecified reprisals if they selected the Union as their collective bargaining representative.

(d) Telling its employees that it would be futile to select the Union as their collective bargaining representative.

(e) Threatening its employees with discharge if they selected the Union as their collective bargaining representative.

(f) Interrogating its employees about their involvement in a Fair Labor Standards Act lawsuit.

(g) Threatening its employees with unspecified reprisals because of their involvement in the filing of a Fair Labor Standards Act lawsuit.

(h) Implementing new work rules and discipline regarding cell phone use and lateness.

(i) Threatening employees with legal action in retaliation for participating in a Board hearing and because of their Union activity.

(j) Threatening to report employees to Government authorities in order to intimidate witnesses and to discourage them from participating in Board processes.

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<sup>1</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(k) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

1. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Jose Wilfredo Argueta, Jose Martin Torres, Jose Michael Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Jose Wilfredo Argueta, Jose Martin Torres, Jose Michael Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify Jose Wilfredo Argueta, Jose Martin Torres, Jose Michael Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon in writing that this has been done and that their discharges will not be used against them in any way.

(d) Rescind the work rules entitled "Employee Code of Conduct" which was implemented on July 21, 2015, and notify the employees that it has done so.

(e) Within 14 days after service by the Region, hold a meeting or meetings during working time, scheduled to ensure the widest possible attendance, at which the attached Notice to Employees" to the employees shall be read to employees by Danny Bindra, Tony Bindra, Herb Miller or Amjad Malik in English and in Spanish during work time, or at the Respondent's option, by a Board agent in the presence of the Respondent's officials, supervisors and agents named above.

(f) Within 14 days from the date of this Order, publish in three publications of general local interest and circulation copies of the attached Notice to Employees, signed by the Respondents' general manager Tony Bindra, or his successor, and to do so at its expense. Such Notice shall be published twice weekly for a period of 8 weeks. The publications shall be determined by the Regional Director for Region 29, and need not be limited to newspapers so long as they will achieve broad coverage of the area.

(g) Upon the request of the Union, immediately furnish it with lists of the names, addresses, and classifications of all the Respondent's employees as of the latest available payroll date, and furnish a corrected, current list to the Union at the end of each 6 months thereafter during a period of 2 years following the entry of this Order.

(h) Within 14 days after service by the Region, post at its facility in Bethpage, New York,

copies of the attached notice marked "Appendix." <sup>2</sup> Copies of the notice, in English and in Spanish, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 17, 2015.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

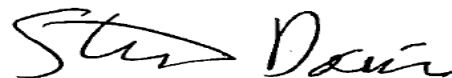
**IT IS FURTHER ORDERED AS FOLLOWS:**

1. The Objections to the election are hereby overruled.

2. The proceedings in Case No. 29-RC-146077 are hereby remanded to the Regional Director for Region 29. He is directed to open and count the ballots of Jose Wilfredo Argueta, Jose Martin Torres, Jose Michel Torres, and Manjit Singh, and issue a revised tally of ballots.

3. If the revised tally of ballots shows that a majority of the valid votes cast at the election were cast for the Petitioner, I recommend that the Petitioner be certified. If the revised tally of ballots shows that the Petitioner has lost the election, I recommend that the election be set aside, and that all proceedings in Case No. 29-RC-146077 be vacated.

Dated, Washington, D.C. May 25, 2016



Steven Davis  
Administrative Law Judge

<sup>2</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the national Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## **APPENDIX**

### **NOTICE TO EMPLOYEES**

**Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

#### **FEDERAL LAW GIVES YOU THE RIGHT TO**

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities

WE WILL NOT discharge you because of your activity in behalf of United Workers of America, Local 660, or your concerted activities or because you filed a lawsuit pursuant to the Fair Labor Standards Act.

WE WILL NOT give you the impression that your Union activities were under surveillance.

WE WILL NOT threaten you with unspecified reprisals if you select United Workers of America, Local 660 as your collective bargaining representative.

WE WILL NOT tell you that it would be futile to select the Union as your collective bargaining representative.

WE WILL NOT threaten you with discharge if you select the Union as your collective bargaining representative.

WE WILL NOT interrogate you about your involvement in a Fair Labor Standards Act lawsuit.

WE WILL NOT threaten you with unspecified reprisals because of your involvement in the filing of a Fair Labor Standards Act lawsuit.

WE WILL NOT unlawfully implement new work rules and discipline regarding cell phone use and lateness.

WE WILL NOT threaten you with legal action in retaliation for participating in a Board hearing and because of your Union activity.

WE WILL NOT threaten to report you to Government authorities in order to intimidate you as a witness and to discourage you from participating in Board processes.

WE WILL NOT in any other manner interfere with, restrain, or coercing you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, offer Jose Wilfredo Argueta, Jose Martin Torres, Jose Michael Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes,

Javier Reyes, and Augustin Sabillon full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Jose Wilfredo Argueta, Jose Martin Torres, Jose Michael Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges, and within 3 days thereafter notify Jose Wilfredo Argueta, Jose Martin Torres, Jose Michael Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon in writing that this has been done and that their discharges will not be used against them in any way.

WE WILL immediately rescind the unlawfully implemented new work rules entitled "Employee Code of Conduct" which were implemented on July 21, 2015 regarding cell phone use and lateness, and notify the employees that we have done so.

WE WILL within 14 days after service by the Region, hold a meeting or meetings during working time, scheduled to ensure the widest possible attendance, at which the attached Notice to Employees to the employees shall be read to employees by Danny Bindra, Tony Bindra, Herb Miller or Amjad Malik in English and in Spanish during work time, or at the Respondent's option, by a Board agent in the presence of the Respondent's officials, supervisors and agents named above.

WE WILL within 14 days from the date of this Order, publish in three publications of general local interest and circulation copies of the attached Notice to Employees, signed by the Respondent's general manager Tony Bindra, or his successor, and to do so at its expense. Such Notice shall be published twice weekly for a period of 8 weeks. The publications shall be determined by the Regional Director for Region 29, and need not be limited to newspapers so long as they will achieve broad coverage of the area.

WE WILL upon the request of the union, immediately furnish it with lists of the names, addresses, and classifications of all the Respondent's employees as of the latest available payroll date, and furnish a corrected, current list to the Union at the end of each 6 months thereafter during a period of 2 years following the entry of this Order.

DEEEP DISTRIBUTORS d/b/a/  
THE IMPERIAL SALES, INC.

(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlrb.gov](http://www.nlrb.gov).



Two MetroTech Center (North), Jay Street and Myrtle Avenue, Suite 5100

Brooklyn, New York 11201-3838

Hours: 9 a.m. to 5:30 p.m.

718-330-7713.

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/29-CA-147909](http://www.nlr.gov/case/29-CA-147909) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S

COMPLIANCE OFFICER, 718-330-2862